

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: NEW ENGLAND COMPOUNDING
PHARMACY, INC. PRODUCTS LIABILITY
LITIGATION

v.

This Document Relates To:

All Suits Against the Saint Thomas Entities

MDL No. 2419

Master Docket: 1:13-md-2419-RWZ

**LIBERTY INDUSTRIES, INC.’S RESPONSE TO
SAINT THOMAS ENTITIES’ MOTION FOR CLARIFICATION REGARDING
LIBERTY’S INDUSTRIES, INC.’S SUMMARY JUDGMENT BRIEFING**

Liberty Industries, Inc. (“Liberty”) hereby files this response to the Saint Thomas Entities’¹ Motion For Clarification Regarding Liberty’s Summary Judgment Briefing. Saint Thomas Entities’ motion requests that the Court, in issuing its order adjudicating Liberty’s Omnibus Motion for Summary Judgment in Cases Filed by Plaintiffs Injected in Indiana [Dkt. No. 1471], expressly note that the order has no effect on the comparative fault allegations asserted by the Saint Thomas Entities against Liberty in other cases. For the reasons set forth below, Liberty does not contend that an order allowing Liberty’s Motion for Summary Judgment would have a preclusive effect on the Saint Thomas Entities’ comparative fault allegations against Liberty.

Liberty’s Motion for Summary Judgment seeks summary judgment on the claims asserted against Liberty by plaintiffs injected with contaminated methylprednisolone acetate (“MPA”) in Indiana.² It does not seek summary judgment with respect to any comparative fault

¹ Saint Thomas West Hospital f/k/a St. Thomas Hospital; Saint Thomas Health; and Saint Thomas Network.

² Appendix I to the motion contains a list of the cases to which the motion pertains.

allegations of the Saint Thomas Entities. In fact, as the Saint Thomas Entities point out, they are not parties to any case to which Liberty's Motion for Summary Judgment applies. As non-parties to the applicable cases, the grant of summary judgment in favor of Liberty in those cases should not have an effect on the allegations asserted by the Saint Thomas Entities in other cases in MDL No. 2419. See Zachary B. Savage, Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials, 88 N.Y.U. L. REV. 439, 454 (2013) ("[o]n occasion, consolidated parties do agree in advance of a bellwether trial to be bound by its results, but without such agreements, trials generally cannot exert preclusive effect over anyone other than their named parties.") [emphasis added]; see also, e.g. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359 (2d Cir. 2003) (allowing bellwether to have binding effect on non-parties only where plaintiffs and defendants had agreed to resolve the entire matter using a bellwether trial); DeLuca by DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 952 (3d Cir. 1990) ("[p]rinciples of issue preclusion have not developed to the point where we may bind plaintiffs by the finding of previous proceedings in which they were not parties, even by a proceeding as thorough as the multidistrict common issues trial").

Therefore, to the extent the Court is inclined to allow the Saint Thomas Entities' motion, Liberty does not contend that the Court's ruling on Liberty's Motion for Summary Judgment should have an effect on the Saint Thomas Entities' comparative fault allegations.

Respectfully submitted,
LIBERTY INDUSTRIES, INC.,
By its attorneys,

/s/ Peter G. Hermes

Peter G. Hermes, BBO No. 231840
phermes@hermesnetburn.com
Scott S. Spearing, BBO No. 562080
sspearing@hermesnetburn.com
Kara A. Loridas, BBO No. 681727
kloridas@hermesnetburn.com
HERMES, NETBURN, O'CONNOR
& SPEARING, P.C.
265 Franklin Street, 7th Floor
Boston, MA 02110
(617) 728-0050 (T)
(617) 728-0052 (F)

Dated: December 2, 2014

CERTIFICATE OF SERVICE

Pursuant to Local Rules 5.2(b)(2) and 5.4 of the Local Rules of the United States District Court for the District of Massachusetts, I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that paper copies will be sent by first-class mail to those indicated as non-registered participants, if any, on December 2, 2014.

/s/ Peter G. Hermes

Peter G. Hermes